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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 857

WAYNE L. SOSZKA, *Appellant,*

vs.

JOSEPH NICK MANGANARO and MARTHA A. ELIZABETH CANOUSE MANGANARO, *Appellees.*

On Appeal from the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL

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Appellees move the Court to dismiss the appeal herein on the following grounds:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

QUESTION PRESENTED

Where a non-resident motorist is served by publication pursuant to a statute authorizing such service, are Fourteenth Amendment due process requirements met when it appears that such non-resident defendant cannot be located within or without the state, and that summons cannot be served neither personally nor by registered mail.

STATEMENT OF THE CASE

This cause was commenced on June 13, 1966, in the Circuit Court of the First Circuit, State of Hawaii, by Plaintiffs and Appellees, Joseph Nick Manganaro and Martha A. Elizabeth Canouse Manganaro, against Defendant and Appellant, Wayne L. Soszka. Appellees sought damages from Appellant for injuries suffered by them arising out of the operation of a motor vehicle by Appellant on the public highways of the State of Hawaii.

At the time of filing suit, Appellant could not be physically located within the State of Hawaii. Accordingly, service of process was next attempted by serving a certified copy of the Complaint and Summons on the Director of Regulatory Agencies, State of Hawaii, pursuant to Sections 230-33, Revised Laws of Hawaii, 1955, as amended (Hawaii's Non-resident Motorist Statute). Copies of the Complaint, Summons and Notice of Service of Summons by Delivery of a Certified Copy to the Director of Regulatory Agencies were forwarded by certified mail, postage prepaid, return receipt of addressee only requested, to Appellant

Soszka at his last known forwarding address in San Francisco, California, on June 28, 1966. These were returned by the Post Office Department with the notation "no such number." In mid-September, 1966, Appellees' further search indicated that Appellant was residing at a Berkeley, California, address. Copies of the Complaint, Summons and Notice of Service of Summons were sent by certified mail, postage prepaid, return receipt of addressee only requested, to Appellant's new, last known address. Once more they were returned by the post office with the notation "moved, left no address." On January 18, 1967, a Motion for Service by Publication, with accompanying affidavit setting forth the above facts, was filed with the First Circuit Court, State of Hawaii. The Court entered an order directing service by Publication and Notice and Summons were published in the Honolulu Advertiser as required by the statute. A default judgment was entered at 9:00 o'clock a.m. on March 21, 1967. The attorney for Appellant's insurance carrier, upon being notified that the case was being heard that morning, appeared one minute after 9:00 o'clock, made a special appearance to contest jurisdiction, and the Court set aside the default.

Appellant then moved to quash the process of service. After a hearing, the trial court denied the motion and allowed an interlocutory appeal. On appeal, the Supreme Court of Hawaii affirmed the Circuit Court ruling, finding the notice procedure of Section 230-33 R.L.H. as amended, in compliance with due process requirements. *Manley v. Nelson,* 50 Hawaii ....., 443 P. 2d 155 (June 27, 1968).

ARGUMENT

I

NOTICE PROCEDURE UNDER THE HAWAII NONRESIDENT MOTORIST STATUTE, (§230-33 R.L.H., AS AMENDED), MEETS RECOGNIZED DUE PROCESS REQUIREMENTS

It has long been recognized that a state may constitutionally designate some local official as agent to accept service of process for a non-resident motorist operating a motor vehicle upon the highways of that state as to actions arising out of the use of those highways. It is also recognized that when service of process is effected in this manner, the statute must also provide some method for the giving of notice to the non-resident principal in order to meet the requirements of due process. *Hess v. Pawlowski,* 274 U.S. 352, 71 L.ed. 1091 (1927). On this appeal, the defendant claims the Hawaii provision for notice to the non-resident defendant, i.e. by publication when efforts to locate him and give actual notice have failed, fails to meet the requirements of due process.

This Court has held that actual notice need not be given to the non-resident principal to sustain service of process made on his implied agent. Rather, to meet constitutional due process requirements, the statutory provision for notice must make it reasonably probable that notice will be communicated to the non-resident defendant. This standard has been expressed by this Court, in the following terms:

> ". . . It must be reasonably probable that he will receive actual notice." *Wuchter v. Pizzutti,* 276 U.S. 13, 72 L.ed. 446 (1928), at p. 19.

> ". . . It must be reasonably calculated, under all the circumstances, to apprise interested parties. . . ." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.ed. 865 (1950), at p. 314.
>
> ". . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at p. 315.

And legal writers have codified the standard, as follows:

> ". . . (A) state may properly provide for constructive or substituted service on non-residents without violating due process requirements, as in the case of use of highways by non-residents, although in all cases it should be made reasonably probable that defendant to be charged shall receive actual notice as a result of the constructive notice." 16A C.J.S., *Constitutional Law*, 619 at p. 791.

As defined by the Hawaii Supreme Court in the instant case, Section 230-33 R.L.H. as amended requires employment of the following procedure in giving notice to a non-resident defendant: First plaintiff must ascertain that defendant is no longer within the state. The Director of Regulatory Agencies must then be served with a copy of the Complaint and Summons. Copies of the Complaint and Summons and notification of service upon the Director must then be sent to defendant by registered or certified mail, return receipt requested of defendant only. To complete the service by registered mail, the return receipt, signed by defendant, must be filed with the Court. If this procedure cannot be completed, and the Court is

satisfied that plaintiff has made a diligent search and cannot in good faith locate defendant, the Court may allow plaintiff to complete service by publication pursuant to the statute.

The test of the constitutionality of this procedure is that it must be reasonably probable the defendant will actually receive notice under all the circumstances. To give actual notice the defendant must first be located. The statute provides that if defendant cannot be found within the state or elsewhere in order to personally serve the summons upon him by registered mail or otherwise, and the Court is so satisfied, it may order service by publication, with like effect as if defendant had been personally served within the state. This is all that is required by *Mullane v. Central Hanover Bank & Trust Co.,* Id. at p. 315: "The means (of notice) employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Although it is true that the required search for defendant will not always prove successful, such is not the demand of the constitutionality test.

Section 230-33 R.L.H. requires that if defendant cannot be located after diligent search, and the Court is so satisfied, an attempt must be made to notify defendant by publication. Admittedly, publication is not likely to result in effective notice, but at least plaintiff will have exhausted all possible avenues of notice. The Court, in *Mullane v. Central Hanover Bank & Trust Co., Id.* at p. 317, made the following revelant comment:

". . . This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."

II.

NOTICE PROCEDURE UNDER THE HAWAII NONRESIDENT MOTORIST STATUTE (§230-33 R.L.H.), IS CONSISTENT WITH TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE

In light of the statutory requirement of diligent search, holding this statute invalid would, as a practical matter, lead to a requirement of actual notice. This would place an undue burden on the resident plaintiff, usually leaving him with no remedy against a defendant who commits a wrongful act and disappears from the jurisdiction, either leaving no forwarding address or, as is equally possible, refusing to accept a registered letter sent him. It is far more equitable, and equally within the demands of justice, to place the burden on the non-resident defendant to make his whereabouts known, than leave plaintiff without local remedy. As the Hawaii Supreme Court noted in the instant case:

"If a non-resident operator of a motor vehicle involved in an accident or collision sincerely de-

> sires to be informed when suit is commenced, it is a simple matter for him to leave with a person injured or suffering damages or involved in the collision or with a police officer investigating the accident his permanent address to so notify the person or persons of the change."

At least the non-resident motorist should certainly be stopped from denying notice, the lack of which stems from his imprudent failure to advise plaintiff of his whereabouts.

CONCLUSION

For the foregoing reasons, Appellees respectfully move the Court to dismiss the appeal herein and to affirm the holding of the Supreme Court of the State of Hawaii.

Dated, Honolulu, Hawaii,
March 14, 1969.

Respectfully submitted,
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GREENSTEIN & COWAN,
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